[J-22A-B-1999]
IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	No. 32 E.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court, dated July 29, 1997, at
	:	No. 1740 Philadelphia 1996, affirming the
v.	:	Order of the Court of Common Pleas of
	:	Philadelphia County, dated April 23, 1996,
	:	at Nos. 1749-53.
VERNON HILL,	:	
	:	
Appellant	:	ARGUED: February 3, 1999

COMMONWEALTH OF PENNSYLVANIA,	:	No. 104 M.D. Appeal Docket 1998
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court, dated August 27, 1996, at No. 2953
v.	:	Philadelphia 1995, reversing the Order of
	:	the Court of Common Pleas of
	:	Lackawanna County, dated November 15,
GEORGE CORNELL,	:	1995, at No. 92CR589
	:	
Appellant	:	ARGUED: February 3, 1999

CONCURRING/DISSENTING OPINION

MR. JUSTICE ZAPPALA **DECIDED: August 17, 1999**

Although I concur in the disposition of Commonwealth v. Hill, I must respectfully dissent from the disposition of Commonwealth v. Cornell.

The criminal complaint against Cornell was filed on March 4, 1992. On June 7, 1995, Cornell filed a motion to dismiss the charges pursuant to Pa.R.Crim.P. 1100.[1] The Lackawanna County Common Pleas Court agreed with Cornell that a technical violation of Rule 1100 had occurred and further found that the Commonwealth had failed to meet its burden of proving that it had acted with due diligence in bringing Cornell to trial. Accordingly, the court dismissed the charges against Cornell.

On appeal, the Superior Court reversed the order of the common pleas court on the basis that no technical Rule 1100 violation had occurred. The Superior Court reasoned that the periods of delay attributable to Cornell's co-defendants constituted excludable time with regard to the Rule 1100 calculation.

In reaching the conclusion that no technical Rule 1100 violation had occurred, the Superior Court failed to follow our decision in Commonwealth v. Hagans, 394 A.2d 470 (Pa. 1978). As aptly stated by the majority, "[s]ince . . . the charges against [Cornell] were dismissed 479 days after the filing of the criminal complaint for purposes of Rule 1100, well beyond the 365 day deadline prescribed by Rule 1100(a)(3), a violation of Rule 1100 has occurred." (Slip Opinion at 23). With this portion of the majority's analysis, I agree.

The majority nevertheless goes on to affirm the Superior Court's order, which reversed the trial court's dismissal of the charges against Cornell, agreeing with the Superior Court that "the delay in this prosecution was occasioned by circumstances beyond

[1] "Rule 1100 provides that a trial must commence no later than 365 days from the date on which the criminal complaint is filed unless there is 'excludable' time, delay attributable to the defendant or defense counsel. However, a defendant is not entitled to a dismissal of charges after 365 days if the Commonwealth exercises due diligence in attempting to go to trial. Pa.R.Crim.P. 1100(g)." Commonwealth v. Matis, 710 A.2d 12, 16 (Pa. 1998).

the Commonwealth's control, and . . . there is no evidence that prosecution of this case was performed with anything but due diligence." (Super. Ct. Op. at 9). In so finding, the Superior Court exceeded the applicable standard of review and the majority perpetuates the error.

The standard of review of a trial court's decision to dismiss charges pursuant to Rule 1100 is whether the trial court abused its discretion. Commonwealth v. Edwards, 595 A.2d 52 (Pa. 1991). The appellate court must confine its inquiry to the evidence in the record along with the findings of the trial court. Commonwealth v. Matis, 710 A.2d 12 (Pa. 1998).

In its memorandum and order, the trial court noted that it was following the Rule 1100 procedure set forth by the Superior Court in Commonwealth v. Senft, 591 A.2d 318 (Pa. Super. 1991):

> First, we must "determine whether there is a technical violation of the Rule by applying either subsections (a)(1), (a)(2), (a)(3) or (a)(4).["] Commonwealth v. Senft, 591 A.2d at 319 (citation omitted). Second, we must "determine whether any time should be excluded from the three hundred sixty-five (365) days under subsection (c)." Id. at 320 (citation omitted). Finally, we must "determine at the hearing on the petition to dismiss whether, despite the technical violation of the three hundred and sixty-five (365) days, the Commonwealth has with due diligence attempted to bring the matter to trial and whether the delay was beyond the control of the Commonwealth." Id.

(Trial Ct. Op. at 9).

After undertaking the first two parts of the analysis, the trial court properly determined that a technical Rule 1100 violation had occurred. The trial court was then faced with the due diligence analysis:

> "Where three hundred and sixty-five (365) days is exceeded by time not attributable to the defendant's conduct, the burden of proof is placed upon the Commonwealth to establish, by a preponderance of the evidence, that it acted with due diligence in bringing the defendant to trial. Commonwealth v. Johnson, 592 A.2d 710, 708 (Pa. Super. 1991). The

> Commonwealth, at the time of hearing, must create a record establishing that, regardless of due diligence, it could not bring the defendant to trial in a timely fashion. Commonwealth v. Caden, 487 A.2d 1, 4 (Pa. Super. 1984).
>
> While the "court may properly take judicial notice of uncontested notations in the court record in determining whether the Commonwealth has exercised due diligence in attempting to bring an accused to trial," Commonwealth v. Kite, 468 A.2d 775, 778 n.4 (Pa. Super. 1983), "mere assertions of due diligence, as well as unsupported facts, are insufficient to meet the required burden." Commonwealth v. Caden, 487 A.2d at 4 (citations omitted). "[P]roof of due diligence must appear in the record and failure to adhere to this requirement will justify dismissal with prejudice." Commonwealth v. Hadfield, 496 A.2d 1201, 1204 (Pa. Super. 1985) (citing Commonwealth v. Wall, 449 A.2d 690 (Pa. Super. 1982).

(Trial Ct. Op. at 12-13). *Accord* Commonwealth v. Browne, 584 A.2d 902 (Pa. 1990) (The Commonwealth bears the burden of proving that its efforts to bring the defendant to trial were reasonable and diligent).

The trial court determined that the Commonwealth had failed to meet its burden of establishing that it acted with due diligence in attempting to bring Cornell to trial. The trial court stated:

> [T]he Commonwealth, rather than present evidence, chose to rely on the record. Thus, our decision is bound solely by the record, as it stands. The Commonwealth asserts, without more, that it acted with due diligence in that the defendant had motions pending before the Court from August 15, 1992 through November 9, 1994. For the reasons previously addressed, we find this unpersuasive, particularly in light of the Commonwealth's representation [that no motions of Cornell were held open prior to April 5, 1994]. We further find the Commonwealth's assertion that the delays caused by co-defendant Young were attributable to defendant Cornell as unpersuasive, however unwarranted and distracting these delays may have been.
>
> It is true that delays caused by a co-defendant may be attributable to another defendant in the same case. Commonwealth v. Long, 532 A.2d 853, 855 (Pa. Super. 1987). However, in order to relate such delay to another defendant in the same case, the Commonwealth must introduce "affirmative evidence" that the defendant "consented or gave the appearance of approval to the delays caused by the co-defendant." Commonwealth v. Hagans, 364 A.2d at 330. Absent this evidence, the defendant cannot be held

> accountable for delay caused by a co-defendant. Commonwealth v. Kelly, 369 A.2d 879, 882 (Pa. Super. 1976).
>
> The Commonwealth, in the case before us, did not present evidence or affirmatively show that defendant Cornell acquiesced or agreed to the delay caused by co-defendant Young, nor did the Commonwealth establish that defendant Cornell joined in the conduct of defendant Young contributing to the delay. In contrast, defendant Cornell, from the outset, moved for severance from defendant Young, however, the Commonwealth opposed this motion. *See* Commonwealth v. Kelly, [369 A.2d 879 (Pa. Super. 1976)] (citing Commonwealth v. Brown, 364 A.2d 330 (Pa. Super. 1976)[,] and Commonwealth v. Hagans, 364 A.2d 328 (Pa. Super. 1976), the Superior Court recognized that when the Commonwealth is faced with such a delay, it has the burden to move for severance of trial).

(Trial Ct. Op. at 13-14).

The trial court thus determined that the Commonwealth, in declining to present evidence at the Rule 1100 hearing and choosing instead to rely solely on the record, had failed to meet its burden of proving that it had acted with due diligence in attempting to bring Cornell to trial. The trial court found particularly persuasive the fact that the Commonwealth failed to move for severance of Cornell's trial from that of his co-defendants, when the Commonwealth was confronted with a delay implicating Rule 1100.

This Court has made it abundantly clear that "[t]he Commonwealth must do everything reasonable within its power to guarantee that a trial begins on time." Matis, 710 A.2d at 17, citing Browne. Certainly, severance was a reasonable alternative within the power of the Commonwealth.[2]

Nevertheless, the majority ignores the findings of the trial court and fails to follow the applicable standard of review, arriving at a contrary conclusion through its own independent

[2] This is especially so when one balances a defendant's constitutional right to a speedy trial against the interests of the Commonwealth and judicial economy in the criminal justice system.

review of the record. (*See* Slip Opinion at 23-24).[3] Conspicuously absent from the majority's analysis is any indication of how the trial court abused its discretion in determining that the Commonwealth failed to meet its burden of establishing that it acted with due diligence.

Absent a showing of an abuse of discretion on the part of the trial court, the Superior Court's order in the case of Commonwealth v. Cornell should be reversed and the order of the trial court, dismissing the charges, should be reinstated.

[3] In doing so, the majority has once again abdicated its responsibility in applying our own court made rules. "So as to avoid following the clear and unambiguous mandate of Rule 1100, the majority has seen fit to once again redraft the Rule by interpretation rather than amendment." Commonwealth v. Koonce, 515 A.2d 543, 549 (Pa. 1986) (Zappala, J., dissenting); *see also* Commonwealth v. Bond, 532 A.2d 339 (Pa. 1987) (Zappala, J., dissenting); Commonwealth v. Monosky, 511 A.2d 1346 (Pa. 1986) (Zappala, J., dissenting); Commonwealth v. Terfinko, 474 A.2d 275 (Pa. 1984) (Zappala, J., dissenting); Commonwealth v. Crowley, 466 A.2d 1009 (Pa. 1983) (Zappala, J., dissenting); Commonwealth v. Green, 469 A.2d 552 (Pa. 1983) (Zappala, J., dissenting); Commonwealth v. Manley, 469 A.2d 1042 (Pa. 1983) (Zappala, J., dissenting); Commonwealth v. Guldin, 463 A.2d 1011 (Pa. 1983) (Zappala, J., dissenting).